UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DONALD R. LAFORTUNE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-275-P-H***
	)	
FIBER MATERIALS, INC.,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT

The defendant, Fiber Materials, Inc., seeks summary judgment in this action alleging violations of the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq*., and its Maine counterpart, 26 M.R.S.A. § 844 *et seq*. I recommend that the court grant the motion in part.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp*., 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case.

Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Background

The parties' statements of material facts, submitted pursuant to this court's Local Rule 56, include the following undisputed material facts.

The defendant is in the business of designing, manufacturing and testing advanced composites and in fabricating high temperature insulation and industrial materials. Statement of Material Facts ("Defendant's SMF") (Docket No. 23) ¶ 1; Plaintiff's Response to Defendant's Statement of Material Facts, etc. ("Plaintiff's Responsive SMF") (Docket No. 34) ¶ 1. At all relevant times, Philip Pastore was the defendant's Division Manger for Support Services; his duties included oversight of the personnel department. *Id*. ¶ 2. For some of the relevant time, Francis James was the defendant's Division Manager of the Safety Department. *Id*. ¶ 3. The Safety Department is responsible for all safety and environmental issues for the defendant. *Id*. ¶ 4. At all relevant times, Michael Neveux was a project manager for the defendant with the same job responsibilities, although his title may have changed. *Id*. ¶ 6.

The plaintiff worked for the defendant for over 20 years. *Id*. ¶ 7. On or about April 2, 2001 he took medical leave due to a problem with his right knee that required surgery. *Id*. ¶ 8. At that time, his title was Facilities Maintenance Supervisor. *Id*. ¶ 9. Neveux was the plaintiff's supervisor. *Id*. ¶ 10. The plaintiff's job included supervising two other employees and performing maintenance tasks himself. *Id*. ¶ 13. The plaintiff performed plumbing maintenance, among other duties. *Id*. ¶ 14. The plaintiff performed all of the functions of this job before he went on medical leave even though his knee bothered him more at that time than it did when he returned from medical leave. Plaintiff's Statement of Additional Material Facts ("Plaintiff's SMF") (included in Plaintiff's Responsive SMF, beginning at 16) ¶ 55; Reply Statement of Fact ("Defendant's Responsive SMF") (Docket No. 36) ¶ 55. When the plaintiff went out on leave, on or about April 9, 2001, he gave the defendant a note from his doctor which indicated that he would be back to work within 60 days. Defendant's SMF ¶ 15; Plaintiff's Responsive SMF ¶ 15. The plaintiff subsequently presented a note dated May 25, 2001 indicating that he would be out for another two to four weeks. *Id*. ¶ 16.

The plaintiff returned to work on June 18, 2001. *Id*. ¶ 17. He had been out of work for a total of 11 weeks. *Id*. At or about the time he returned to work, the plaintiff presented the defendant with a doctor's note prescribing "light duty" and stating, "no ladder work," "no squatting," "may do light maintenance," and "may walk as tolerated." *Id*. ¶ 18. When he returned to work, the plaintiff was moved to a position in the Safety Department. *Id*. ¶ 25. The defendant needed someone to do the nonphysical work that was assigned to the plaintiff. *Id*. ¶ 26. James testified at deposition that the position he gave to the plaintiff "was perfect for . . . his physical condition at that time and it was a job that needed to be done badly because it had been neglected for quite a while." *Id*. ¶ 30. It was a job that would have taken well over a year. *Id*. ¶ 31. The plaintiff's pay and benefits remained the same. *Id*. ¶ 32.

By a note dated June 25, 2001 the plaintiff's physician instructed that he "continue current restrictions." *Id*. ¶ 34. On July 13, 2001 this physician extended the plaintiff's "light duty" for an additional two weeks. *Id*. ¶ 35. James needed another employee to assist the plaintiff with his project. *Id*. ¶ 37.

The plaintiff was laid off on May 20, 2002. *Id*. ¶ 51. An employee from the Maintenance Department was also laid off. *Id*. ¶ 50. During the two years before the layoff, eleven of the defendant's employees took FMLA leave. *Id*. ¶ 52. The plaintiff was the only one of these eleven who was involuntarily laid off. *Id*.

III. Discussion

The complaint alleges that the defendant violated the FMLA by failing to restore him to his maintenance position or an equivalent position upon his return from leave and by terminating his employment because he had taken medical leave. Complaint (Docket No. 1) ¶¶ 12-14 (Count I). It alleges that the defendant's conduct also violated the Maine Family and Medical Leave Requirements, 26 M.S.R.A. § 843 *et seq*. *Id*. ¶¶ 15-18 (Count II).

A. The State-Law Claims

The relevant statute provides:

> Every employee who has been employed by the same employer for 12 consecutive months is entitled to up to 10 consecutive work weeks of family medical leave in any 2 years unless employed at a permanent work site with fewer than 15 employees.

26 M.R.S.A § 844(1). It is undisputed that the plaintiff was absent from work for 11 consecutive work weeks. Defendant's SMF ¶ 17; Plaintiff's Responsive SMF ¶ 17. It therefore appears that any claims made by the plaintiff under the state statute must fail. *Jewell v. Reid's Confectionary Co.*, 172 F.Supp.2d 212, 221 (D. Me. 2001).

The plaintiff contends, however, that the defendant "agreed that he could take 12 weeks of medical leave," invoking 26 M.R.S.A. § 844(1)(C). Plaintiff's Memorandum in Opposition to the Defendant's Motion for Summary Judgment ("Opposition") (Docket No. 33) at 14. That subsection of the statute provides: "The employer and employee may negotiate for more or less leave, but both parties must agree." 26 M.R.S.A. § 844(1)(C). As evidence of such an agreement the plaintiff offers his own affidavit and an exhibit submitted with his statement of material facts. Plaintiff's SMF ¶ 56. The affidavit merely presents the conclusory statement that "[t]he Defendant agreed that I could take 12 weeks of medical leave while I underwent and recovered from knee surgery." Affidavit of Donald R. Lafortune in Support of Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment (submitted with Opposition) ¶ 6. The exhibit is a document entitled "Employer Response/Notice to Employee for Family or Medical Leave" and clearly refers to the federal statute ("Family and Medical Leave Act of 1993"). Amended Exhibit 3, submitted with Opposition.[1] The form refers throughout only to the FMLA. The only reference in the document to the length of the leave that is the subject of the form is the statement that "you have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period for the reasons listed above." *Id*. at [1]. Even under the generous standards concerning the drawing of inferences applicable in the summary judgment context, this document cannot reasonably be interpreted to show that the defendant negotiated with the plaintiff and agreed that he could take 12 weeks of leave for purposes of the state statute. By the plaintiff's interpretation, every Maine employee taking FMLA leave would thereby be deemed to have his or her employer's agreement to extend the scope of the state statute by an additional

[1] The Exhibit 3 initially submitted was a blank copy of this form. The amended Exhibit 3 is the same form, with the blanks filled in, and the notation "Don — For your home records." It was submitted with the plaintiff's unopposed Motion for Leave to Amend Plaintiff's Memorandum in Opposition, etc. (Docket No. 37), which has been granted. Docket No. 38.

two weeks. Such an interpretation effectively changes the terms of the state statute. The defendant is entitled to summary judgment on Count II.

B. The FMLA Claims

The plaintiff makes two distinct claims under the FMLA. First, he contends that the defendant failed to comply with the statute when it placed him in the safety department upon his return from leave rather than assigning him to the position he held before he began his leave or to a position with equivalent status, benefits and pay. Complaint ¶ 12. Second, he contends that the defendant retaliated against him for taking medical leave, in violation of the FMLA. *Id*. ¶¶ 13-14.

1. Restoration to position. The FMLA requires that an employee who returns from covered leave "be restored by the employer to the position of employment held by the employee when the leave commenced" or "be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1). In this case, the plaintiff was not restored by the defendant to his pre-leave position. While the position he was given provided the same pay and benefits, the plaintiff contends that it was not an equivalent position because the "other terms and conditions" of the safety department job were not equivalent to those of the maintenance position. Opposition at 6-13. He also contends that he was able to perform the essential functions of the maintenance position upon his return, *id*. at 6-8, despite the succession of "light duty" notes from his physician that he submitted to the defendant. However, since there is no question that the plaintiff was not restored to his original position and the statute requires only that the employer provide either such a restoration or an equivalent position, there is no need to address the plaintiff's arguments concerning his ability to perform the essential functions of the maintenance position. The statute expresses no preference for restoration to the original position; all that an employer need do is to provide an equivalent position. 29 C.F.R. § 825.214(a); *Green v. New Balance*

Athletic Shoe, Inc., 182 F.Supp.2d 128, 136 (D. Me. 2002). In this case, therefore, the question is whether the defendant did so.[2]

The regulations implementing the FMLA describe an equivalent position as follows:

> An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

29 C.F.R. § 825.215(a).[3] Here, the plaintiff has submitted evidence that would allow a reasonable factfinder to conclude that the safety department position to which he was assigned did not provide privileges, perquisites and status equivalent to those of the maintenance position. For example, the safety department position lacked the supervisory responsibilities of the plaintiff's former position and deprived him of a private office. Plaintiff's SMF ¶¶ 54, 57, 71. Loss of responsibilities and status may be sufficient to allow a factfinder to reach the conclusion that the new position is not equivalent to the former position. *See, e.g., Donahoo v. Master Data Ctr.*, 282 F.Supp.2d 540, 551-52 (E.D. Mich. 2003); *Parker v. Hanhemann Univ. Hosp.*, 234 F.Supp.2d 478, 491 (D.N.J. 2002). *See generally Cooper v. Olin Corp.*, 246 F.3d 1083, 1091-92 (8th Cir. 2001) (question for jury whether office position was equivalent to that of

[2] The question whether the plaintiff was physically capable of performing the essential functions of the maintenance position at the time of his return may well be relevant to the question whether the safety department position was equivalent to the maintenance position, particularly if, as the plaintiff contends, Opposition at 10-12, the transfer to the new position later caused him to be laid off, s*ee Patterson v. Alltel Info. Servs., Inc.*, 919 F. Supp. 500, 505 n.10 (D. Me. 1996). *See also Watkins v. J & S Oil Co.*, 164 F.3d 55, 59 (1st Cir. 1998) (employer may take employee's physical capabilities into account in determining equivalent work).

[3] To the extent that the opinion in *Green*, 182 F.Supp.2d at 138, could be interpreted to hold that the FMLA entitles a returning employee only to a position with equivalent pay and benefits, I decline to follow it and conclude that equivalent working conditions are required as well under applicable law. *See Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998) (employee "entitled to return to the same position or an alternate position with equivalent pay, benefits, and working conditions").

locomotive engineer given plaintiff's physical ability to perform former job). The defendant is not entitled to summary judgment on this aspect of the plaintiff's FMLA claim.

2. Retaliation. The plaintiff contends that the defendant retaliated against him in violation of the FMLA both by placing him in the safety department position upon his return and by laying him off over a year after his return. Opposition at 14-27.

The FMLA provides that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of . . . any right provided under this subchapter." 29 U.S.C. § 2615(a). This provision has been uniformly interpreted by the courts to protect an employee from discrimination by his employer in retaliation for exercising his FMLA rights. *E.g., Hodgens*, 144 F.3d at 159-60. The First Circuit has adopted the *McDonnell Douglas* burden shifting framework for the analysis of FMLA retaliation claims on summary judgment. *Id*. at 160-61. Thus,

> [t]o make out a prima facie case of retaliation, [a plaintiff] must show that (1) he availed himself of a protected right under the FMLA; (2) he was adversely affected by an employment decision; (3) there is a causal connection between the employee's protected activity and the employer's adverse employment action.

Id. at 161.[4] If a *prima facie* case is established, the court must determine whether the employer has articulated a legitimate nondiscriminatory reason for the adverse employment action and, if so, whether the plaintiff has demonstrated that the reason was a pretext and that the adverse employment action was actually undertaken because he took FMLA leave. *Id*. at 166.

[4] The plaintiff contends that this standard was altered by *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). Opposition at 14-15 & n.9. I disagree. As the First Circuit has noted, that decision holds only that circumstantial evidence is sufficient to establish motive in employment discrimination cases. *Beacon Mut. Ins. Co. v. OneBeacon Ins. Group*, 376 F.3d 8, 17 (1st Cir. 2004). The First Circuit has suggested that it would not adopt the plaintiff's position on this issue, *Hillstrom v. Best Western TLC Hotel*, 354 F.3d 27, 31 & n.3 (1st Cir. 2003), but in any event it is not necessary to reach the issue in this case because the plaintiff states, Opposition at 16, that he is pressing both a mixed-motive claim, to which *Desert Palace* applies, and a pretext claim, to which it does not.

With respect to both violations alleged by the plaintiff, it is clear that he availed himself of a protected right under the FMLA. It is beyond dispute that the lay-off was an adverse employment action. The defendant contends that the assignment of the plaintiff to the safety department job was not an adverse employment action because it was made "in response to specific instructions from the plaintiff's physician for light duty." Defendant's Reply Memorandum in Support of Motion for Summary Judgment ("Reply") (Docket No. 35) at 5. It cites no authority in support of this argument. The plaintiff argues vigorously that he was able to perform his maintenance job despite the light-duty restriction. Opposition at 6-8, Plaintiff's SMF ¶¶ 54-55, 58, 61-62, 70. The term "light duty" does not include any specific physical limitations as a matter of law. The doctor's note at issue includes restrictions of "no ladder work," "no squatting" and "may do light maintenance." Defendant's SMF ¶ 18; Plaintiff's Responsive SMF ¶ 18. The parties dispute whether ladder work and squatting were essential functions of the plaintiff's maintenance position. *Id*. ¶¶ 19-22. An adverse employment action includes "stripp[ing the employee] of many work-related privileges," refusing to consider the employee's requests for transfer or promotion, removing the employee from a position, threats of retaliation for protected activity and reassignment to a remote cubicle, *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 42, 48 (1st Cir. 1999), several of which, as well as a loss of status, are suggested by the plaintiff's offered evidence in this case, *e.g.*, Plaintiff's SMF ¶¶ 57-58, 61-62, 71. There is a disputed issue of material fact on this element of the retaliation claim with respect to the assignment to the safety department position.

It then becomes incumbent on the plaintiff to point to some evidence to show that this action was undertaken in order to retaliate against him for taking FMLA leave. *Randlett v. Shalala*, 118 F.3d 857, 863 (1st Cir. 1997). In this case, the plaintiff offers the alleged discriminatory animus of the defendant's

president and personnel manager and the temporal proximity of the events as evidence of the causal relationship. Opposition at 19-22.

The temporal proximity of the plaintiff's use of FMLA leave and his assignment to the safety department position could not be closer. Temporal proximity alone may be sufficient to establish the necessary causal connection. *Che v. Massachusetts Bay Transp. Auth.*, 342 F.3d 31, 38 (1st Cir. 2003). I conclude that the plaintiff has established a *prima facie* case of unlawful retaliation with respect to his assignment to the safety department position. The defendant makes no attempt to argue that it had a legitimate nondiscriminatory reason for the assignment. Defendant's Motion, etc. ("Motion") (Docket No. 22) at 9-10 (discussing retaliation claim only in context of layoff); Reply at 5-6. Accordingly, there is no need to consider this claim further. The defendant is not entitled to summary judgment on the FMLA retaliation claim arising out of the plaintiff's assignment to a position in the safety department upon his return from leave.

With respect to the layoff, the analysis begins with the element of causation. The plaintiff cannot rely merely on temporal proximity, because the layoff took place eleven months after his return from FMLA leave. *See Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173, 177-78 (3d Cir. 1997) (termination occurred almost a year after alleged protected activity; more evidence of causation required). As was the case with the reassignment, the plaintiff offers the alleged discriminatory animus of the defendant's president and personnel manager in addition to temporal proximity as evidence of the causal relationship with respect to the layoff. Opposition at 19-22. Evidence of discriminatory treatment after the protected activity and before the layoff will serve to establish causation. *Che*, 342 F.3d at 38. The burden of establishing a *prima facie* case on this element is "not onerous," and the showing "is easily made." *Id.* In this regard, the plaintiff cites paragraphs 59-65 of his statement of material facts. Opposition at 20-22.

Paragraph 59 of the plaintiff's statement of material facts asserts that Pastore, who supervised the defendant's personnel department, Defendant's SMF ¶ 3, Plaintiff's Responsive SMF ¶ 3, or his employee, called the plaintiff's physician "on at least three occasions" during the plaintiff's leave "to inquire about when he could return to work," stating that the plaintiff had been out on leave "quite a while" and that "this was not a workers' compensation case," Plaintiff's SMF ¶ 59. This paragraph may not reasonably be interpreted to show animus based on the fact that the plaintiff took FMLA leave. It is reasonable for an employer to want to know when an employee who has indicated that he may take up to 60 days of medical leave, Defendant's SMF ¶ 15, Plaintiff's Responsive SMF ¶ 15, may actually return to work. The observations that the leave was not due to a work-related injury and that several consecutive weeks of absence constitute "quite a while" do not suggest animus.

Paragraph 60 of the plaintiff's statement of material facts asserts that Pastore called the plaintiff at home during the week before the plaintiff returned to work, irately accusing the plaintiff of defrauding the defendant's disability insurance company and increasing everyone's insurance rates by abusing the system. Plaintiff's SMF ¶ 60. This incident, disputed by the defendant, Defendant's Responsive SMF ¶ 60, would allow the drawing of a reasonable inference of animus based on the plaintiff's use of FMLA leave.

Paragraph 61 of the plaintiff's statement of material facts asserts that, when asked by the plaintiff why he was "taken out of his position in the Maintenance Department" upon his return from leave, Pastore "became irate" and gave the plaintiff "an unwarranted written reprimand." Plaintiff's SMF ¶ 60. This paragraph, as presented, would not allow a reasonable factfinder to infer that Pastore's reaction was due to the plaintiff's use of FMLA leave.

Paragraph 62 of the plaintiff's statement of material facts states that Pastore "summarily denied" several requests by the plaintiff to be transferred back to the maintenance department and that Pastore had

decided to "permanently strip [the plaintiff] of his status as Facilities Maintenance Supervisor." Plaintiff's SMF ¶ 62. Again, there is nothing in this paragraph to allow a reasonable factfinder to conclude that Pastore's alleged actions were based on the plaintiff's use of FMLA leave.

Paragraph 63 of the plaintiff's statement of material facts states, *inter alia*, that Mr. Subilia, who was apparently the defendant's president, Plaintiff's Responsive SMF ¶ 44, discussed James's recommendation to lay the plaintiff off with Pastore, Plaintiff's SMF ¶ 63. Neither that statement nor any of the other information included in this paragraph demonstrates any animus on the part of the defendant towards the plaintiff with respect to his use of FMLA leave.

Paragraph 64 of the plaintiff's statement of material facts asserts that Subilia told Pastore to find a position for the plaintiff that would accommodate his restrictions, did not consider returning the plaintiff to his maintenance position, knew that the plaintiff had injured his back before he injured his knee, and "did not want to take any chance that [the plaintiff] might get injured again and require additional medical leave." Plaintiff's SMF ¶ 64.[5] Again, a reasonable factfinder could not infer from this information any discriminatory animus against the plaintiff based on his use of FMLA leave. An employer cannot be found to harbor discriminatory animus because its president expresses an intention to find suitable work for an employee returning from medical leave and to prevent re-injury of that employee.

Paragraph 65 of the plaintiff's statement of material facts states that James told Pastore, in a conversation about potential layoffs, that he could do without the plaintiff because the plaintiff was less "versatile" than the other employee in the safety department and that the plaintiff had refused to attend four

[5] In this regard, the plaintiff also cites Subilia's deposition testimony, Opposition at 22, but that testimony is not included in the plaintiff's statement of material facts and accordingly may not be considered by the court. Contrary to the plaintiff's representation, *id*., paragraph 64 of the plaintiff's statement of material facts does not support an assertion that Subilia recommended that the plaintiff be assigned to "desk work."

or five seminars related to safety training. Plaintiff's SMF ¶ 65. Again, the substance of this paragraph does not allow the drawing of a reasonable inference that the plaintiff's use of FMLA leave gave rise to James's preference for the other safety department employee when the necessity for layoffs arose.

On the evidence presented, a reasonable factfinder could conclude that Pastore harbored animus toward the plaintiff as a result of his use of FMLA leave and that Pastore took part in the decision to terminate the plaintiff's employment. The evidence is minimal, but, given the low level of the burden applicable in the First Circuit in such cases, *Che*, 342 F.3d at 38, I conclude that the plaintiff has established a *prima facie* case with respect to the layoff.

The defendant does offer a nondiscriminatory reason for its decision in this instance: that the plaintiff was laid off due to a downturn in business. Motion at 10. "[T]he evidence is clear and undisputed that Mr. James chose Plaintiff for lay-off because he did not want to do training and for no other reason." *Id*. It is fortunate that the defendant relies on the latter assertion, because the only paragraph of its statement of material facts that supports the former assertion, Defendant's SMF ¶ 44, is without any citation to the summary judgment record, a fact noted by the plaintiff in his response, Plaintiff's Responsive SMF ¶ 44. This court will not rely on a paragraph in a statement of material facts that is unsupported by a citation to the summary judgment record, unless that paragraph is admitted by the nonmoving party.

The plaintiff does not contend that the defendant has not offered a legitimate nondiscriminatory reason for the layoff. Rather, he contends that the proffered reason is pretextual, because he never refused to undertake safety training. Opposition at 22-24; Plaintiff's Responsive SMF ¶¶ 40-43. This evidence is sufficient to allow the claim based on the layoff to proceed to trial. The defendant is not entitled to summary judgment on Count I.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED** as to Count II and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 25th day of October, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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